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No. 365

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

CHARLES MYRON MOORE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

Charles Myron Moore, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on April 19, 1967.

CITATIONS TO OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the judgment and sentence of the United States District Court for the Eastern District of Missouri is reported as Moore v. United States, 375 F. 2d 877 (8th Cir. 1967), and is printed in Appendix A.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on April 19, 1967. Petition for Rehearing or in the Alternative for Rehearing En Banc was filed on May 9, 1967 and denied on May 16, 1967. Petitioner's Application for Extension of Time Within Which to File Petition for Writ of Certiorari was filed with this Court on June 7, 1967, and on June 9, 1967 the Court entered its order Extending Time to File Petition for Writ of Certiorari to and including July 15, 1967. The jurisdiction of this Court to review the judgment of the Court of Appeals by Writ of Certiorari is invoked under 28 U. S. C., Section 1254 (1) and Rule 22 (2) of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED.

1. Is it plain error within Federal Rule of Criminal Procedure 52 (b) to charge a jury that they may infer defendant had knowledge of the counterfeit nature of currency from the fact defendant intended to pass the currency passed when the law requires such act be done with the specific criminal intent to defraud?

2. Is it plain error within Federal Rule of Criminal Procedure 52 (b) to charge the jury that they may infer specific criminal intent, intent to defraud, from an isolated act where such intent is not inherent in the act itself?

3. Is it plain error within Federal Rule of Criminal Procedure 52 (b) for a charge to create an incriminating judicial presumption which the jury could use as a substitute for proof of the specific criminal intent required by statute?

4. Does a charge which gives the jury a positive misdirection regarding proof of criminal intent unless there

is evidence to the contrary shift the burden of proof to the defendant on the issue of defendant's specific criminal intent and thereby constitute plain error within Federal Rule of Criminal Procedure 52 (b)?

5. Does a charge which creates an incriminating judicial presumption which the jury could use as a substitute for proof of specific criminal intent unless there is evidence to the contrary undermine defendant's presumption of innocence and thereby constitute plain error within Federal Rule of Criminal Procedure 52 (b).

6. Does an appellate court have the power to make a subjective fact determination that the evidence of defendant's guilt is strong so as to remove the plain and prejudicial error from a charge which is admittedly erroneous regarding defendant's sole defense?

7. Is it plain error within Federal Rule of Criminal Procedure 52 (b) to give an admittedly erroneous charge on criminal intent when defendant's request to give a proper charge is refused?

STATUTE AND RULE INVOLVED.

18 U. S. C. 472.

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeit, or altered obligation or other security of the United States, shall be fined not more than $5,000.00 or imprisoned not more than fifteen years, or both. June 25, 1958, C. 645, 62 Stat. 705.

Federal Rule of Criminal Procedure 52 (b).

Rule 52. Harmless Error and Plain Error.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF CASE.

Petitioner was tried and convicted in the United States District Court for the Eastern District of Missouri on all counts of a three count indictment in which each count charged petitioner with passing a Ten Dollar ($10.00) counterfeit bill in violation of Title 18, Section 472, U. S. C. Thereupon defendant was sentenced to five years on each count, said sentences to run concurrently (T. 135).

At the trial petitioner admitted he was the individual involved in the transactions alleged. The sole defense was petitioner's contention that he had not acted with the required and specific criminal intent to defraud because he had not passed the bills in issue with knowledge of the fact that they were counterfeit. A detailed statement of the evidence is not considered to be facts material to the consideration of the questions presented, at least at this time, other than necessary to meet the contention of the Court of Appeals that in their opinion the evidence in the case was strong and convincing in that defendant did not deny passing the counterfeit bills and the pattern used in passing them by one who handled a lot of money, as the defendant admittedly did, amounted to strengthful proof of scienter (Court's opinion, p. 8). These facts can best be presented in the argument amplifying the reasons relied on for the allowance of the Writ.

At the conclusion of the evidence, and consistent with petitioner's sole defense, petitioner requested the court to instruct the jury as follows:

> "You will note that the acts charged in the indictment are alleged to have been done with 'intent to defraud.' In this regard, the court instructs you that the mere act of possessing and passing counterfeit money without knowledge that it is counterfeit does not constitute passing counterfeit money with

the intent to defraud such as to constitute a crime against the laws of the United States. It is the burden of the government to prove beyond a reasonable doubt that the accused knew of the counterfeit character of the United States currency in the denominations of Ten Dollars ($10.00) as mentioned in the evidence before he would be guilty of any crime.

If you are not convinced beyond a reasonable doubt that the accused knew of the counterfeit character of the United States currency mentioned in the evidence, then it will be your sworn duty to find the accused not guilty and acquit the accused" (T. 132).

The court refused to give this instruction (T. 131), but no objection was made to this refusal by trial counsel.

Thereafter without objection by trial counsel, the court charged the jury along the following general lines on the material issue of intent. The jury was told that to establish the offenses charged in each count of the indictment it was necessary it be proved beyond a reasonable doubt that the acts of passing counterfeit obligations of the United States were done with the intent to defraud and the burden was upon the government to prove this element (T. 125-126). It was then charged that it was the position of the defendant that at the time the defendant possessed and passed the counterfeit currency he had done so without knowledge of the fact that the currency was counterfeit and thereby had no intent to defraud. Accordingly the jury was told that if they were not convinced beyond a reasonable doubt that the defendant knew of the counterfeit character of the bills in issue then it would be their sworn duty to acquit the defendant (T. 126). Thereupon, the jury was informed that in a criminal case the matter of intent was an essential element which must exist for the accused to be guilty and before they could find the defendant guilty that the jury must believe that not only

did the defendant do the acts complained of, but must also believe that the acts were intentional and knowingly done by the defendant (T. 126).

The jury was next charged that "knowingly" meant that state of mind where defendant was in possession of facts from which he knew or was aware that he could not do the acts with which he was charged (T. 126-127). The jury was then told that they should note that the acts charged in the indictment were alleged to have been done with the "intent to defraud". This meant to act knowingly and with the specific intent to deceive or cheat for the purpose of causing some loss to another or bring about some financial gain to one's self (T. 127).

Now, the court charged that intent may be proved by circumstantial evidence, that it can rarely be established by any other means, that while the witness may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts charged were done, but what a defendant does or fails to do may indicate intent to commit offense charged (T. 127).

At this point, the court then gave the instruction here questioned and in the following language:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of **acts knowingly done** or knowingly omitted. **So unless the contrary appears from the evidence**, the jury may draw the inference that **the accused intended all the consequences** which one standing in like circumstances and possessing like knowledge should reasonably have expected to result **from any act knowingly done** or knowingly omitted by the accused (T. 127-128)." (Emphasis added.)

Through new counsel, petitioner during the oral argument of his appeal contended that notwithstanding the failure of trial counsel to object to the giving of the objectionable instruction that under the mandate of **Mann v. United States**, 319 F. 2d 404 (5th Cir. 1963), cert. denied 375 U. S. 986 (1964), the giving of the objectionable instruction was plain error affecting substantial rights which the court was required to recognize under Federal Rule of Criminal Procedure 52 (b).

The court below affirmed the judgment of the District Court rejecting Petitioner's contention that the objectionable instruction was plain error. In doing so, the court noted the objectionable instruction and similar instructions had been criticized by that court and other courts, and held to be plain error in **Mann v. United States**, *supra*. However, on the authority of **Imholte v. United States**, 226 F. 2d 585 (8th Cir. 1955), and **Sherwin v. United States**, 320 F. 2d 137 (9th Cir. 1963), cert. denied 375 U. S. 964, 84 S. Ct. 481, 11 L. Ed. 2d 420 (1964), the Court of Appeals held that, while it is better not to give the instruction in a case where intent is not inherent in the act itself, its inclusion in a charge does not constitute prejudicial error where the charge considered as a whole correctly stated the law with sufficient clarity as not to be misleading (Court's opinion, pp. 6-9). The opinion gave no consideration to the contention of counsel that there was a refusal by the court to give an instruction which was proper under the law.

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below in the instant case is directly in conflict with the two decisions of the Fifth Circuit Court of Appeals in **Mann v. United States**, 319 F. 2d 404 (5th Cir. 1963), cert. denied 375 U. S. 986 (1964), and **Berkovitz v. United States**, 213 F. 2d 468 (5th Cir. 1954). Additionally, the decision in the court below is in direct conflict with the decision of the Ninth Circuit Court of Appeals in **Bloch v. United States**, 221 F. 2d 786 (9th Cir. 1955).

The identical language of the objectionable charge in the instant case was utilized by the trial court in **Mann v. United States**, *supra* (See Appendix C). The Court of Appeals held the charge was plain error within the meaning of Federal Rule of Criminal Procedure 52 (b). In doing so, the court rejected the government's contention that when the charge was read as a whole the issue of intent was properly presented to the jury and thereby rendered harmless error. In this regard, the court stated that it was mindful that the objectionable charge would not be error if the charge as a whole fairly gave the law to the jury on the necessity of intent. Accordingly, the court was careful to set out in the footnotes to its opinion the whole of the charge given by the trial court on the issue of intent. Examination of this charge as it appears in Appendix C herein clearly demonstrates that the whole of the charge on the issue of intent in **Mann** was far more complete than in the instant case. Nevertheless, the court held that instructions to the jury must be consistent and not misleading and relied on appropriate authority to hold that the fact one instruction is correct does not cure error in giving another inconsistent instruction.

Moreover, **Mann**, supra, recognizes the real difficulty with the objectionable charge. In this regard, the court

demonstrated that the difficulty with the instruction occurs when the words "**so unless the contrary appears from the evidence**" are introduced into the instruction. The burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. It is demonstrated that if an inference from a fact must be defeated by evidence, then the effect of the instruction is to create a presumption and place the burden on the accused to overcome the presumption.

Mann, further finds vice in the instruction by pointing to the fact that the statute requires a specific criminal intent and that under the instruction involved the jury was invited to speculate as to what any person similarly situated as defendant and with like knowledge could reasonably have expected to be the consequences of the conduct in which he was engaged. Recognizing that the sole defense of defendant was his good faith and lack of criminal intent the Fifth Circuit Court of Appeals thought that such an error affecting such a vital aspect of the case was fundamental error within Federal Rule Criminal Procedure 52 (b), and went to the very essence of the case.

There could be no more direct conflict than in **Mann** and the instant case. While it is true that **Mann** involved an income tax evasion case where the statute requires the element of wilfullness in such case, the semantic difference between "wilfullness" and "intent to defraud" as an element of specific criminal intent is a distinction without a difference.

Berkovitz v. United States, supra, leaves some question as to whether or not there was a proper objection to the objectionable charge, but in the final analysis rejects an incorrect instruction on the question of defendant's good faith by stating that:

"However, the fundamental error is that in a criminal case where the defense, as here, was good faith and absence of criminal intent, what was said had the effect of telling a jury as a matter of law that such proof was sufficient without more to show criminal intent, whereas this was one of the most important phases of the issues of fact that the prosecution was bound to prove beyond a reasonable doubt. The distinction is the difference between facts **tending** to establish guilt and telling the jury they may in effect consider guilt proven thereby. The court undoubtedly may tell them they are entitled to consider the circumstances described in the charge as to tending to prove intent but when it is said that such intent was to be presumed from the facts stated, it necessarily shifted the burden thereafter to the shoulders of the accused to prove his innocence. (Court's emphasis.) 213 F. 2d 468, 476 (5th Cir. 1954).

Moreover, the decision of the Ninth Circuit Court of Appeals in **Bloch v. United States**, 221 F. 2d 876 (9th Cir. 1955), is likewise directly in conflict with the decision of the court below in the instant case. In **Bloch**, the court held it was plain error to charge the jury on the issue of defendant's wilfullness or specific criminal intent in almost the identical language of the charge in the instant case. In the rationale the court demonstrated that the trial court had properly charged the jury that defendant's acts must have been willfully and intentionally done with the intent that the government be defrauded and labeled this a correct statement of the law. The court then noted that the trial court went on to instruct in the language of the objectionable instruction and that this is not a correct statement of the law with regard to a criminal offense wherein a specific intent is an essential element. Relying on the authority of **Morissette v. U. S.**, 342 U. S.

246 (1952), the **Bloch** court demonstrated that the fundamental error in the charge is when the jury is told in effect that they can draw the conclusion that the defendant intended to defraud the government from the mere fact that he filed an incorrect income tax return. In language of the instant case, the error in the objectionable charge is that the jury is told in effect that they may draw the conclusion that the defendant intended to defraud from the mere fact that he passed a counterfeit bill.

In construing the statute and issue in the instant case the courts have uniformly held that the act of passing counterfeit currency, within the language of the statute, must be done **with the intent to defraud** and that the naked act of passing counterfeit money **without knowledge** that it is counterfeit is insufficient to constitute the offense charged in the statute. **United States v. King**, 326 S. 2d 415 (6th Cir. 1964); **United States v. Litberg**, 175 S. 2d 20, 23 (6) (7th Cir. 1949). In other words, a necessary and essential element of the crime is that the defendant had guilty knowledge that the bill or obligation he passes is actually counterfeit. **United States v. Carll**, 105 U. S. 611 (1882); **United States v. Brown**, 348 F. 2d 661, 662 (2nd Cir. 1965); **Zottarelli v. United States**, 20 F. 2d 795, 798 (6th Cir. 1927). And it is the burden of the government to prove such guilty knowledge of defendant beyond a reasonable doubt. **United States v. Berkley**, 288 F. 2d 713, 715 (6th Cir. 1961); **Gallagher v. United States**, 144 Fed. 87, 88 (1st Cir. 1906); **United States v. Ruffino**, 67 F. 2d 440 (2nd Cir. 1963).

Accordingly, **Bloch**, supra, recognizes that the principles are the same in any statute which requires a specific criminal intent and therefore the errors and charges respecting this issue are plain and affect substantial rights of the defendant and the fairness of the trial.

As recognized in all of the above cases, the decision in the court below is in conflict with the principles of

Morissette v. United States, 342 U. S. 246 (1952). In **Morissette**, supra, this Honorable Court clearly establishes the principle that where the intent of the accused is an element of the crime charged, such specific intent is a question of fact which must be submitted to the jury and the trial court may not prejudge the issue by instructing the jury that the law raises a presumption of intent from a single act where such intent is not inherent in the act itself. **Morissette v. United States**, 342 U. S. 246, 273-276 (1952).

These same principles are approved in **Wardlaw v. United States**, 203 F. 2d 884 (5th Cir. 1958) and **Haner v. United States**, 315 F. 2d 792 (5th Cir. 1963), whose principles are again in conflict with the decision of the Eighth Circuit Court of Appeals in the instant case.

2. Clearly, the question is of importance in the administration of criminal justice in federal courts. The Supreme Court holds the prime responsibility for the proper functioning of the Federal Judiciary. **McNabb v. United States**, 318 U. S. 332, 341 (1943). Of late, and properly so, the court has been exercising its jurisdiction to assure defendants they receive basic fundamentals of fairness in state criminal proceedings. Nothing could be more significant in measuring the fundamental fairness of a federal criminal proceeding than assuring a defendant that the trial court will properly conclude whether the case is one of general criminal intent or specific criminal intent. This determination lacks any real complexity and conforms with the statutory protection afforded the defendant who acts in good faith. This statutory protection is a substantial right of the accused and should not be permitted to be destroyed by a singular act of ineptness on the part of his counsel in failing to call the court's attention to such a fundamental issue. Particularly is this true when the defendant has been forthright enough to

admit the act but request the jury to understand that it was innocent in nature. Assuring an accused that the jury will be properly charged on his statutory protection is plainly in the public interest and is so peculiar to every federal criminal proceeding as to not be burdensome to the court to require that the court affirmatively afford the accused this substantial right in its charge.

Conceding the appropriateness in some cases of the conclusion of the Eighth Circuit Court of Appeals in the instant case that "a defendant is entitled to a fair trial but not a perfect trial" (Court's opinion, p. 9), it would appear difficult to apply the label of fairness to any proceeding where the accused's sole defense was undermined by a charge which presumed the accused's intent from an act which he readily admits, but which is not inherently froth with criminal intent. The language of the statute is an admonition to the contrary and necessarily designed to protect citizens who innocently become possessed of counterfeit currency as it moves in the channels of commerce. Moreover, the principles of **Morissette**, supra, and the other authorities herein are too fundamental and substantial to the fair administration of criminal justice in the federal judiciary to be undermined by a technical procedural rule. And these principles are not illusory or unique, but rather are substantial principles present in every federal criminal proceeding.

3. The decision of the court below is respectfully believed to be erroneous and the conflicting authorities herein, both in direct holdings and principles, are so accurate, well founded and needful of approval for the proper administration of criminal justice in the federal judiciary as to dictate the granting of the Writ in the instant case. Some of the basic and fundamental errors in the decision below necessitate comment.

In alluding to the charge as a whole as being such that the court of appeals felt it would be unrealistic for them to assume that the jury was misled, confused or in any manner swayed or influenced by the giving of the objectionable instruction (Court's opinion, p. 9), the Court of Appeals has noted that the trial court clearly and plainly charged the jury on defendant's presumption of innocence, the government's burden of proof, and the necessity of the jury finding and believing the acts were intentionally and knowingly done (Court's opinion, p. 8). All of this overlooks the fact that no other instruction given by the court makes any reference or gives any direction regarding the method or weight which a jury should utilize in evaluating the evidence. Conceding the accurateness of the other instructions alluded to by the Court of Appeals, it is no answer to the questions presented that the jury was properly charged as to what they must find but improperly charged as to how such findings could be made. An accurate direction on the facts to be found does not cure and is inconsistent with a positive misdirection respecting the evaluation of the evidence in arriving at a finding. Even though the trial judge gives an accurate charge on the necessity of intent and the burden of proof, plain error within the meaning of Federal Rule of Criminal Procedure 52 (b) is not cured by an inconsistent and misleading instruction. **Mann v. United States**, 319 F. 2d 404 (5th Cir. 1963), cert. denied 375 U. S. 986 (1964). A trial judge's charge may not prejudge the issue of criminal intent, nor usurp the right of the jury to consider all of the evidence on this vital issue, by charging the jury that the law raises a presumption of intent from a single act where such intent is not inherent in the isolated act. **Morissette v. United States**, 342 U. S. 246 (1952). Incorrect statements of law with regard to a criminal offense, wherein specific intent is an essential element and the sole defense, create ex-

ceptional circumstances, especially in criminal cases, which seriously affect the fairness, integrity and public reputation of judicial proceedings. In the public interest, these are errors which the Supreme Court has said should be noted as substantial though no exception was taken to them. **U. S. v. Atkinson**, 297 U. S. 157; see also **Bloch v. United States**, 221 F. 2d 786 (9th Cir. 1955).

A manifest error in the reasoning of the Court of Appeals is the assertion that the admittedly erroneous charge is not prejudicial where the proof of defendant's guilt was strong (Court's opinion, pp. 7, 9). Such a determination judicially usurps the fact-finding function of our jury system and constitutes a subjective determination of the evaluation the jury would place on the evidence had they been properly charged. This role is far afield from the role of our appellate courts in our system of jurisprudence, that of reviewing questions of law. The evaluation of the weight of evidence is a function vested exclusively within the province of a jury. Unless the utmost protection is afforded to this concept, the meaning of our jury system is seriously undermined.

But even more importantly, in reaching the conclusion that the evidence of the defendant's guilt was strong and convincing, the Court of Appeals has reached for the very acts condemned by the authorities in determining the error of the objectionable charge. In the opinion of the court the evidence was strong and convincing because:

> "**Defendant did not deny passing the counterfeit bills** and the pattern used in passing them by one who handled a lot of money, as defendant admittedly did, amounts to strengthful proof of scienter" (Court's opinion, p. 8). (Emphasis added.)

This subjective evaluation of the evidence is in direct conflict with the cases firmly establishing the principle that the naked act of passing counterfeit currency is not

evidence that defendant knew the bills were counterfeit and thereby passed with intent to defraud. **United States v. King**, 326 F. 2d 415 (6th Cir. 1964); **United States v. Litberg**, 175 F. 2d 20 (7th Cir. 1949).

Additionally, the court has overlooked the evidence in concluding that the counterfeit bills involved bore obvious defects (Court's opinion, p. 4). One victim of the bills certainly noticed no defect when she sent her son out for change for the bill (T. 8-9). Another victim could not tell whether the bill was good or bad (T. 42-43). There were varied opinions concerning the nature of the currency passed at a bar at another time (T. 47). Most importantly, Treasury Agent Stigall was the government's expert witness respecting the counterfeit nature of the bills and testified that a person's ability to recognize or detect the bills as counterfeit would vary with his eye for perceptive detail and his eye for art (T. 43). One can handle large sums of money as defendant admittedly did (Court's opinion, p. 8) without possessing any more of a discriminating eye for detail than the witnesses in the case who handled the bills twice without detection of its spurious qualities (T. 13, 16), or another witness who couldn't tell whether it was marked or what (T. 47), or still another witness who did not become suspicious until she had turned the bill over and examined it closely before placing it in her cash register (T. 33), and yet another witness who couldn't tell whether "the bill was right or not" (T. 42-43).

The court's conclusion that between the time of making the purchases charged and the time of the trial, defendant had changed the color of his hair (Court's opinion, p. 4), overemphasizes the evidence on a fine distinction. Witnesses described the defendant as having blond hair in their description of him. At the time of trial, defendant had "sandy colored" hair (government's memorandum

and brief in opposition to defendant's motion for judgment of acquittal and in the alternative for a new trial, p. 3). Moreover, defendant was not denying the identifications. Further, this fact determination is made without affording defendant's counsel an opportunity to argue to a jury that the acts charged were in October, 1965, and the trial in April, 1966, which raises the question of the effect of the lack of bleaching qualities of the sun over the winter months on sandy hair compared with its blonde appearance after exposure to the sun throughout the summer before October, 1965. Such distinctions are too fine to permit an appellate court to substitute its judgment for the perogative of the jury.

The court also attaches significance to the fact that in each instance charged defendant passed a bill for small purchases of about one dollar (Court's opinion, p. 4). This subjective evaluation of the evidence by the Court of Appeals was made in the face of the legal principle established in **United States v. Ruffino**, 67 F. 2d 440 (2nd Cir. 1933), that there is no criminal significance to the fact that defendant's purchases were small since such a fact is just as consistent with innocence as guilt.

Additionally, in determining the question of the prejudicial error of the objectionable charge, the court has overlooked the fact that defendant offered a proper instruction which went to the essence of the defense. The Trial Court refused defendant's request to charge the jury that the acts charged had to be done with the intent to defraud and in this regard the mere act of possessing and passing counterfeit money without knowledge that it is counterfeit did not constitute passing counterfeit money with the intent to defraud such as to constitute a crime against the laws of the United States (T. 132). See **United States v. Litberg**, supra; **United States v. King**, supra.

For all of these reasons, and for other reasons that could be amplified in a complete brief, petitioner respectfully submits that this petitioner will be caused to suffer a substantial injustice and the fairness, integrity and public reputation of federal criminal proceedings will be seriously affected unless a Writ of Certiorari issued to review the questions presented.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES E. GRAY,
Counsel for Petitioner.

J. PAUL ALLRED, JR.,
Of Counsel for Petitioner.

July 15, 1967.

APPENDIX.